

# **EXHIBIT A**

1759

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 - - - - - X  
4 UNITED STATES OF AMERICA, : 15-CR-00637(KAM)  
5 :  
6 -against- : United States Courthouse  
7 : Brooklyn, New York  
8 :  
9 MARTIN SHKRELI, : Thursday, July 6, 2017  
10 : 9:00 a.m.  
11 :  
12 Defendant. :  
13 :  
14 - - - - - X

11 TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL  
12 BEFORE THE HONORABLE KIYO A. MATSUMOTO  
13 UNITED STATES DISTRICT JUDGE, and a jury

13 A P P E A R A N C E S:

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15 Acting United States Attorney  
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Assistant United States Attorneys

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produced by Computer-aided Transcription.

Rosenwald - direct - Srinivasan

1944

1 A I assume so.

2 Q If MSMB Capital did not have an auditor, would that have  
3 affected your investing decision?

4 A Sure.

5 MR. AGNIFILO: Object to the form of the question.  
6 The hypothetical. If something, then would that affect. I  
7 know what he's trying to get at. I'm not trying to get in the  
8 way.

9 THE COURT: I am overruling the objection.

10 You may answer the question, sir. Do you need it  
11 read back?

12 THE WITNESS: Yes, please.

13 MR. SRINIVASAN: I can rust re-ask the question.

14 Q If MSMB Capital did not have an auditor, would that have  
15 affected your investing decision?

16 A Sure.

17 Q How?

18 A I probably would not have made the investment.

19 MR. SRINIVASAN: Now, let's go to Page 35 of the  
20 .pdf, so that's Bates Number LR00078, 20 pages from where you  
21 are right now.

22 Q Do you see the paragraph that starts: Attorneys?

23 A Yes.

24 MR. SRINIVASAN: If we can zoom in, Ms. Balbin, on  
25 the paragraph that starts: Attorneys.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	15-CR-00637(KAM)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Friday, July 7, 2017
MARTIN SHKRELI,	:	9:00 a.m.
	:	
Defendant.	:	

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Kocher - direct - Srinivasan

2319

1 A Yeah. It was presented to me originally that I would be  
2 able to get my money back within one month if I gave them a  
3 head's up one month in advance.

4 Q And was this important to your investment decision?

5 A Yes.

6 Q Would you still have invested in MSMB Healthcare if you  
7 couldn't get your money out in a month's time?

8 A No. No, because, generally speaking, I have very little  
9 cash, so when a project comes up, I need to be able to have  
10 money on hand.

11 Q Before you invested in MSMB Healthcare, did you learn  
12 anything about any hedge funds that Martin Shkreli had run  
13 before MSMB Healthcare?

14 A At that time, no.

15 Q Did the name Elea Capital ever come up in your  
16 conversations about MSMB Healthcare?

17 A Not that I remember.

18 Q If Mr. Shkreli had a prior hedge fund that had performed  
19 poorly, would that have been important for you to know at the  
20 time you were making your investment in MSMB Healthcare?

21 MR. BRAFMAN: Objection, Your Honor.

22 THE COURT: Overruled. You can answer the question.

23 A Yes, of course, it would affect my opinion and judgment.

24 Q Mr. Kocher, did you sign any documents in connection with  
25 your investment?

Kocher - direct - Srinivasan

2320

1 A Yes.

2 Q What did you sign?

3 A A subscription agreement.

4 Q I am going to show you what has been marked for  
5 identification as Government Exhibit 33. Mr. Kocher, you have  
6 two binders in front of you. There is a larger one and a  
7 smaller one. If you could pull out the larger one for now,  
8 and it is tab 33. I'm sorry, tab 35 in your binder.

9 Do you recognize this document?

10 A Yes. This is the subscription agreement.

11 Q For what entity?

12 A This is MSMB Healthcare, L.P.

13 Q Is this your subscription agreement?

14 A I believe it is.

15 MR. SRINIVASAN: Your Honor, we move to admit  
16 Government Exhibit 33.

17 MR. AGNIFILO: No objection.

18 THE COURT: We will admit Government Exhibit 33.

19 (Government's Exhibit 33 was received in evidence.)

20 Q Now, Mr. Kocher, if we can go to the last page of this  
21 document, Bates stamp number R-011888. I think that is page  
22 12, the PDF.

23 A Yes. Page 11, actually.

24 Q Did you sign this document?

25 A Yes, I did.

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 -against-

6 MARTIN SHKRELI,

7 Defendant.

15-CR-00637 (KAM)

United States Courthouse  
Brooklyn, New York

July 10, 2017  
9:00 a.m.

8  
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10 BEFORE THE HONORABLE KIYO A. MATSUMOTO  
11 UNITED STATES DISTRICT JUDGE  
12 BEFORE A JURY

13 APPEARANCES

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MARSHALL - DIRECT - MR. SRINIVASAN

1 approved by the FDA. So a lot of instances depended on FDA  
2 decision, which could be positive or negative.

3 Q At this point, in about December 2014, had the name Elea  
4 Capital came up with your discussion with the defendant?

5 A No.

6 Q If the defendant had run a prior hedge fund that had  
7 performed poorly, would that have been important for you to  
8 know when you make your investment?

9 MR. BRAFMAN: Objection, your Honor.

10 THE COURT: I'll overrule the objection.

11 A Yes, it would have.

12 Q How so?

13 A Well, you want to look at the entire track record of the  
14 person who is making the security selection. So if he had a  
15 bad run, negative result, in it a prior hedge fund, that would  
16 have certainly been something I would have taken into account.

17 Q You also mentioned that you received a subscription  
18 agreement; is that right?

19 A Yes.

20 Q I'm showing you what is marked for identification as  
21 Government's Exhibit 25, which is tab 16 in your binder.

22 A Yes, I have it.

23 Q What is this document?

24 A It's first a questionnaire, which you have to fill out to  
25 show that you're qualified investor for this sort of



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2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 -against-

6 MARTIN SHKRELI,

7 Defendant.

15-CR-00637 (KAM)

United States Courthouse  
Brooklyn, New York

July 10, 2017  
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## PROCEEDINGS

1 MR. AGNIFILO: Your Honor, I have a three-minute  
2 objection to make. I can do it now or at the end of the day.

3 THE COURT: Let's do it now. If it's something you  
4 would like me to think about I'd rather correct it now rather  
5 than wait until the end of the day when the witness is  
6 finished testifying.

7 MR. AGNIFILO: Yes. We've objected, I think with a  
8 number of the witnesses, to questions along the lines of,  
9 'would a certain fact or a certain condition have been  
10 important to you,' or, 'would this have been an important  
11 factor whether or not to invest.'.

12 We've objected to those questions. There is also  
13 sort of a subtle refraining of the question, which is, if you  
14 would have known a certain fact would you have invested.  
15 We've objected to those with many of the witnesses as well.  
16 The reason we're objecting is the question is framed such that  
17 the omission is apparently a material term that the witness  
18 would have wanted to know.

19 While that's all well and good, under the Supreme  
20 Court decision in Matrixx Initiatives Versus Siracusano, 563  
21 United States, page 27, 2011, the standard is an objective  
22 standard. It's a reasonable investor. It's not any one  
23 particular investor. It's not a subjective standard.

24 So it's really irrelevant at the end of the day in  
25 terms of the misrepresentation by omission that any particular

## PROCEEDINGS

1 investor thinking a particular condition or fact is  
2 dispositive of whether he or she would invest.

3 I also note the Supreme Court Basic Versus Levinson,  
4 485 United States 224 from 1988, says very clearly that  
5 silence absent a duty to disclose is not misleading under  
6 10B5, the Securities Laws. The problem with the questions as  
7 being framed is there is no establishment of a duty on the  
8 part of Mr. Shkreli or MSMB to say whether or not he was  
9 involved in Elea Capital or other things that the prosecution  
10 has repeatedly used to frame a question.

11 So that's the basis that we've objected. But I just  
12 want the Court to know why we we've been objecting.

13 THE COURT: May I, just to make sure I understand.  
14 The 10B5 issue comes up with public corporations, these are  
15 questions regarding his knowledge or lack of knowledge when he  
16 made the investment decision, right, in the hedge fund, who's  
17 not a registered security.

18 MR. AGNIFILO: I don't think that the Supreme Court  
19 in Basic or in Matrixx makes the distinction. They are  
20 talking --

21 THE COURT: You said it was not a violation under  
22 10B5, that's why I thought it had to be a publicly-traded  
23 corporation.

24 MR. AGNIFILO: The facts in Basic happened to  
25 involve a publicly-traded corporation. But the Supreme Court

## PROCEEDINGS

1 in these two cases, and there are other cases, the point that  
2 needs to be made is that an omission is a different type of  
3 animal than an affirmative misrepresentation. There are other  
4 requirements that come with an omission that don't exist when  
5 someone says something that is arguably false and misleading.  
6 And that distinction is being blurred in the way the questions  
7 are framed. And we've been objecting because at the end of  
8 the day it suggests that somehow, that someone did something  
9 wrong by not, for instance, saying that Martin was with Elea  
10 Capital, when in fact, there is no establishment of a duty  
11 that he disclose that information.

12 And so to the extent that it's an objective  
13 reasonable investor standard, rather than a subjective  
14 investor standard, it's really an irrelevant question at the  
15 end of the day.

16 Your Honor, so I wanted to introduce that topic. I  
17 think. That's been the reason we've been objecting to these  
18 questions.

19 THE COURT: All right. I'll hear from the  
20 Government.

21 MS. KASULIS: Your Honor, we need to look into these  
22 two cases that counsel just raised. We do believe these  
23 questions are appropriate. We have in fact also charged wire  
24 fraud, where there is material omissions and  
25 misrepresentations, so the omissions piece is important for us

## PROCEEDINGS

1 to prove.

2           Additionally, we've been very careful in the way  
3 that we're framing the questions. It's not, 'if you learned  
4 X.' It's, 'if that fact exists but if there was a prior hedge  
5 fund that not performed well that the defendant was associated  
6 with.' So we've been careful in the way we've asked the  
7 questions purposely.

8           Also, if there is a reasonable investor standard we  
9 have to establish the facts to make the argument that a  
10 reasonable investor would find these omissions and  
11 misrepresentations material. So some of the questions go to  
12 the omissions piece and some of them go to the misrep piece.

13           For example, when the defendant has said he has an  
14 auditor, and if we ask, 'if there was no auditor would that  
15 have been important to you,' the answer is yes. The so then  
16 it establishes the misrepresentations. We can go back and  
17 look at the law that counsel cites. We didn't have the notice  
18 about the law prior to this point, but we can certainly raise  
19 any additional issues with the Court or additional responses.  
20 But this is our response now. We think it's entirely  
21 appropriate. We believe we should be able to continue to ask  
22 these questions.

23           THE COURT: I mean, my understanding is that the  
24 Government has the burden to proof beyond a reasonable doubt  
25 that whether there were material misstatements or omissions.

## PROCEEDINGS

1 Materiality, you say is objective, I agree. But I think that  
2 to ask the investors whether they were aware of, so for  
3 example a discrepancy between what they were told and what the  
4 facts may be, or whether certain facts had they known whether  
5 that would have influenced their investment decision, I think  
6 is something that -- again, I will look at the cases -- but it  
7 seems to me, in my mind, it was directly relevant to the  
8 Government's proof. I'll look at the cases as you have  
9 characterized them.

10 Are we going to expect ongoing objections until this  
11 is resolved? I'll look at the cases. I can't do it now  
12 obviously.

13 It does seem maybe this was an issue you -- it would  
14 have been nice to have had some prior notice of it. We'll  
15 look at it as soon as we can.

16 MR. AGNIFILO: I started doing research when  
17 Mr. Brafman objected to it with the witness who is still on  
18 the stand. The objection was overruled.

19 It occurred to me at that point that we, I would  
20 look into, dig a little deeper, as to why we've been  
21 objecting.

22 THE COURT: I figure you're objecting for a reason.

23 MR. AGNIFILO: We tend to try to have a reason.

24 THE COURT: I would hope so.

25 MR. AGNIFILO: But I want to give your Honor a

## PROCEEDINGS

1 clearer idea of the basis, that's why I'm bringing it up now.

2 MS. KASULIS: Your Honor, we have been eliciting  
3 these questions in the same format with respect to each  
4 witness since our first witness, which was about a  
5 week-and-a-half ago now. So we will continue to solicit those  
6 sorts of answers unless we hear otherwise from the Court as to  
7 those questions.

8 THE COURT: We'll look into it. I can't say we'll  
9 have an answer for you by the time the next witness is asked a  
10 question, but we'll get to it as soon as we can.

11 It would have nice if you raised it even before the  
12 lunch hour, I could have looked at the cases then. But, we  
13 have what we have and I'll deal with what you've given me now.  
14 All right.

15 MR. AGNIFILO: I did most the research over the  
16 lunch hour. Judge, as I do further research, I share it with  
17 the Court.

18 THE COURT: I appreciate that. I'm just saying this  
19 has been going on for a week-and-a-half, there are sort of set  
20 questions that you can expect. We've heard again and again,  
21 I'm not saying it's rote, but each witness is asked to look at  
22 certain documents, and asked what was important to their  
23 decision et cetera, et cetera, so I'm just noting that it  
24 would have been nice, as I've said before, to hear from you  
25 earlier. But we'll now look into what we have been given and

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MARSHALL - CROSS - MR. BRAFMAN

1 I'll try to make a decision before the next witness is asked  
2 the series of questions.

3 MR. AGNIFILO: Thank you, Judge.

4 THE COURT: Did you want to bring the witness back  
5 on the stand, please?

6 MR. BRAFMAN: Your Honor, when the witness testifies  
7 could you just remind him, sometimes he leans back, his voice  
8 doesn't get picked up on the microphone, it's hard to hear.

9 THE COURT: I will. If I'm having trouble, I'm  
10 concerned about everyone else of.

11 MR. BRAFMAN: Thank you.

12 (Jury enters the courtroom.)

13 THE COURT: All our jurors are back, sir, you're  
14 still under oath. Please have a seat.

15 You may proceed, Mr. Brafman.

16 CROSS-EXAMINATION

17 BY MR. BRAFMAN:

18 Q Good afternoon, Mr. Marshall.

19 A Good afternoon.

20 Q Mr. Marshall, if you can, I know it's a long day, but if  
21 can you speak into the microphone, sometimes your voice  
22 doesn't pick up in the back.

23 Sir, my name is Ben Brafman. We've never met; is  
24 that correct?

25 A That's true.



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

15 CR 627(KAM)

versus

4 MARTIN SHKRELI,

U.S. Courthouse  
225 Cadman Plaza East  
Brooklyn, NY 11201

Defendant.

July 11th, 2017

9:00 a. m.

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8 BEFORE THE HONORABLE KIYO MATSUMOTO  
9 UNITED STATES DISTRICT JUDGE

10 APPEARANCES

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## Proceedings

1 (Outside the presence of the jury.)

2 MS. SMITH: Your Honor, just so you know, there were  
3 five binders for this witness, so we put three of them on the  
4 side so it's not blocking.

5 THE COURT: No problem.

6 Do the parties have any matters to bring to my  
7 attention?

8 MS. KASULIS: Yes, your Honor. We wanted to briefly  
9 respond to the issue that the defense raised about the  
10 hypothetical questions, asking the witnesses about  
11 hypothetical questions. I'm going to let Mr. Srinivasan  
12 inform the Court.

13 THE COURT: All right. Sure.

14 MR. SRINIVASAN: So, your Honor, I think there were  
15 two issues raised by the defense yesterday, whether it's  
16 proper to get into issues like whether the defendant disclosed  
17 Alia Capital (phonetic); in other words, information about his  
18 track record in the hedge fund industry, and other issues  
19 we've been asking on the issue of materiality. And the  
20 second is the form of the questions we've been asking.

21 Mr. Agnifilo cited Basic versus Levenson and Matrix  
22 Initiatives, and I think that what those cases stand for is  
23 the proposition that silence -- it's true that silence absent  
24 a duty to disclose is not necessarily actionable, but where a  
25 person makes statements and puts information out there, that

## Proceedings

1 can generate a duty to disclose the truth if the statements  
2 that that person is making are not truthful. So I think that  
3 we've had a lot of evidence in this case about the statements  
4 that are made by the defendant; about his track record, about  
5 whether Capital had an auditor, so on and so forth.

6 We've been asking the witnesses about these issues,  
7 and we think that the evidence is going to prove that the  
8 truth was something very, very different. So I don't think  
9 that a duty to disclose is limited to some specific statutory,  
10 regulatory or contractual obligation; for example, the PPM, so  
11 I think that we have a strong basis under Matrix Initiatives,  
12 which says that it's a highly stacked specific inquiry, and I  
13 think specific to the investing decisions of these investors.

14 On the second issue, the form of the questions,  
15 there's very strong authority -- and I have some cases that I  
16 can hand up to your Honor, and I can hand them to defense  
17 counsel also -- which say that hypothetical questions are,  
18 quote, "plainly relevant and probative when they concern the  
19 materiality of the defendant's actions in the context of a  
20 securities fraud prosecution. That's United States versus  
21 Hatfield 2010 WL 2541057, and that's a Judge Seebart decision  
22 from 2010.

23 And there are a number of other decisions. In the  
24 Second Circuit, for example, there's a case called  
25 United States versus Cuti, where in another fraud prosecution

## Proceedings

1 the government called the auditors of the company to say,  
2 well, you know, if X fact that management had represented to  
3 you had been different, would you have handled the financials  
4 differently? And the 2nd Circuit said clearly that those  
5 sorts of questions are appropriate. And the citation for Cuti  
6 is 720 F.3d 453. Again, I have copies I can hand up to the  
7 Court.

8 THE COURT: All right. Thank you.

9 Mr. Agnifilo.

10 MR. AGNIFILO: What I'll try to do -- and I'll try  
11 to do it over lunch -- is try to take a look at Hatfield and  
12 Cuti, and give your Honor a principled answer.

13 THE COURT: Well, if the question comes up today --

14 MR. AGNIFILO: I don't think it will come up before  
15 lunch.

16 THE COURT: Okay.

17 MR. AGNIFILO: Because I believe a witness that's  
18 been on the stand all morning is a witness that is bringing in  
19 bank records and summarizing them, so I don't think we have an  
20 investor before lunch. If I see that we're going to get it  
21 before lunch, I'll try to do some quick research and take a  
22 look at some cases.

23 THE COURT: Thank you.

24 MR. AGNIFILO: And my colleague has provided me with  
25 copies of the case, which I very much appreciate.

## Proceedings

1 (Pause in proceedings.)

2 MS. SMITH: Your Honor, one last thing, before the  
3 witness today, we're going to read one other stipulation,  
4 which is Government Exhibit 804.

5 THE COURT: Okay. Thank you.

6 The jurors are here, so they're coming up.

7 (In the presence of the jury.)

8 THE COURT: Good morning. All our jurors are  
9 present.

10 Good morning, ladies and gentlemen. Please have a  
11 seat, everyone. All parties and counsel are also present, and  
12 we are ready to proceed with the government's next witness.

13 MS. SMITH: Your Honor, before the government calls  
14 its next witness, we'd like to read one additional stipulation  
15 into the record, which is Government Exhibit 804, and we have  
16 that on the prosecution laptop.

17 It is hereby stipulated and agreed by and between  
18 the undersigned parties that:

19 One, Government Exhibit 117-6 is a true and accurate  
20 copy of a settlement agreement between Merrill Lynch Pierce  
21 Thenner (phonetic) Smith Inc., Merrill Lynch, and the  
22 Defendant Martin Shkreli, Marek Bicek (phonetic), and MSMB  
23 Capital Management L.P., dated September 5, 2012, and is  
24 admissible in evidence;

25 Two, Exhibit A to Government Exhibit 117-6, which is

## PROCEEDINGS

1 waived his presence to be here at oral argument. We discussed  
2 it clearly.

3 THE COURT: Okay. I just didn't want to hear  
4 later --

5 MR. BRAFMAN: No, no, no.

6 THE COURT: -- that he didn't really waive it.

7 Let's go forward. Both Mr. Agnifilo and Mr. Brafman  
8 have confirmed Mr. Shkreli has waived his presence at this  
9 argument regarding the questions that the government was  
10 asking of certain investors regarding their investment  
11 decisions having known certain facts were perhaps different  
12 than that the facts that were presented to them in the  
13 offering documents.

14 MR. SRINIVASAN: Your Honor, if I could clarify, I  
15 don't think our questions ever said if you knew or if you  
16 learned that. I think we phrased it very carefully to avoid  
17 that formulation the assume the fact not in evidence. It was  
18 more if MSMB Capital did not have an auditor. So it's not --  
19 I think Mr. Agnifilo said sometimes we shaded into saying if  
20 you had learned that yesterday and I think we were trying to  
21 be careful to kind of avoid that formulation in our questions.

22 THE COURT: All right. So who wants to be heard  
23 from first, Mr. Agnifilo?

24 MR. AGNIFILO: I'm happy, yes.

25 So I reviewed the cases that the government provided

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1 and I'm grateful they brought the cases. In regard to the  
2 cued decays I think the cued decays is distinct and to sort of  
3 highlights the problem that I had with the situation that  
4 we've been facing. In the *Cuti* decision, the Second Circuit  
5 relied heavily on the fact that the witnesses were experienced  
6 accountants and that the experienced accountants were  
7 basically that the hypothetical question there drew on  
8 undisputed rules of accounting that these accountants would  
9 know, and so when the accountants were asked in substance, you  
10 know, would you have done the accounting differently had this  
11 been the case instead of this been the case, I think the  
12 Second Circuit in *Cuti* was okay with that hypothetical  
13 question because, as the Second Circuit put it, there's  
14 somewhat of a, I guess continuum between fact and opinion, and  
15 because we were talking about experienced accountants and we  
16 were talking about accounting rules, this was more along the  
17 lines of on the factual side rather than on the side of  
18 opinion.

19 My concern with the questions that we've had in this  
20 area in the trial is that they're purely subjective opinions.  
21 They can't be verified. They can't be shown to be false. If  
22 someone says, I would not have invested had I known that there  
23 was not an auditor, or I would have wanted to know about the  
24 Orex trade, or something along those lines, there is no body  
25 of information that the questioner could use to show that the

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1 witness is lying or mistaken. And that's one of the things  
2 that the Second Circuit focused on in the *Cuti* decision when  
3 they said that there was a way of cross-examining the witness  
4 because there was essentially a body of fact, that being the  
5 accounting rules, you know, that these particular witnesses  
6 were well versed in.

7 My concern here is -- it's really two-fold. It's  
8 one that it's really in the nature of an opinion, but really,  
9 and what I was sort of getting at I guess more yesterday, is  
10 it is really irrelevant. I mean, because the standard is an  
11 objective standard, it's an objective investor standard. So  
12 whether a particular investor is, you know, specifically  
13 concerned about liquidity or specifically concerned about an  
14 auditor or is particularly miffed by the fact that the Orex  
15 trade wasn't mentioned, is really in a sense misleading. I  
16 mean, because it's suggesting to the jury that something wrong  
17 legally was done because Mr. Shkreli didn't inform someone of  
18 the Orex trade or didn't inform someone that he managed Elea  
19 Capital, and that's not the standard so it's really an  
20 irrelevant question. And none of that situation is not  
21 addressed by either of the cases that the government provided.

22 And in regard to the *Hatfield* decision, the *Hatfield*  
23 decision is far from a ringing endorsement of the hypothetical  
24 questions. I mean, Judge Seybert was actually quite critical  
25 of the government in that case and thought that their



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1 questions were inappropriate, but not inappropriate to the  
2 degree where it warranted a mistrial. So I don't know that  
3 the *Hatfield* decision really helps us one way or the other  
4 because I thought that Judge Seybert at the end of the day  
5 thought that the questioning was not perfect, far from it,  
6 because if Your Honor recalled -- and I know we didn't have  
7 lot of time to read the cases -- there were two motions  
8 pending in the *Hatfield* decision. The defense was asking for  
9 a mistrial and the government is essentially asking for their  
10 line of questioning to be essentially blessed by the Court as  
11 appropriate and the Court did neither. The Court didn't grant  
12 the defense a mistrial and the Court also didn't bless the  
13 questioning, and was quite critical of the questioning toward  
14 the end of the decision.

15 So looking at the *Cuti* decision, I don't think that  
16 the *Cuti* decision makes this particular questioning of this  
17 particular witness appropriate necessarily because they're  
18 talking about essentially rank subjective opinion, this is  
19 what I believe, this is what I wanted to know. And with a  
20 reasonable objective investor standard that we know exists  
21 from the *Matrix* decision and from *Basic* versus *Levinson*, I  
22 don't think it's an appropriate question.

23 THE COURT: Well, you can't just throw the  
24 reasonable investor concept in front of the jury and ask them  
25 in a vacuum to try to determine what a reasonable investor

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1 would do. I think one way to get there is to -- just let's  
2 note Mr. Shkreli is back with us. One way to do that, as  
3 Judge Seybert noted, was to hear testimony from investors that  
4 would help the jury understand what would be important to an  
5 investor. What information would be important, what  
6 information influenced their investor decision. And I believe  
7 she noted in *Hatfield* that what influence an investment  
8 decision is probative of what a reasonable investor would have  
9 considered.

10 So there has to be some way for the government to  
11 establish that standard and it seems to me that the jury could  
12 listen to those investors and decide whether they exemplify a  
13 reasonable investor, maybe they're not, but to understand what  
14 facts those investors considered important to their investment  
15 decision I think is relevant and material to their burden of  
16 proof.

17 How else do you propose that the government  
18 establish what a reasonable investor would do?

19 MR. AGNIFILO: I think they can do it without asking  
20 the hypothetical question. You can say is liquidity important  
21 to you? Yes, you're done. Is having an auditor important to  
22 you? Yes. I don't think you can go the next step and say the  
23 hypothetical question that they've asked. That's -- my  
24 concern is what the hypothetical -- that's the only thing  
25 we've objected to. We haven't objected to an investor saying

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1 that certain liquidity is important. Certainly Mr. Kocher was  
2 able to testify that liquidity is important to him. Some  
3 other investor witnesses said that AUM was important to them.  
4 I think they're permitted to do that.

5 What we objected to is the hypothetical question  
6 that follows that up. And I don't think it's necessary, I  
7 don't think it advances the ball. I think it's an  
8 inappropriate question. I think it suggests the framing of a  
9 legal issue that's inaccurate and it frames the legal issue as  
10 one of subjectivity and I think it's an inappropriate question  
11 for some of the same reasons that Judge Seybert had a problem  
12 with the questioning in the *Hatfield* decision.

13 THE COURT: Well, sir, I know that you cited the  
14 fact that the witnesses in *Cuti* were accountants and were  
15 applying their accounting principles, but the circuit also  
16 said that we hold that the challenged testimony was properly  
17 admitted as factual testimony under the alternative holding  
18 that it is admissible as lay opinion under Rule 701 which  
19 permits layperson to give an opinion, if it is limited to one  
20 that is rationally based on the witness' perceptions, i.e.  
21 what were they were told, what did they read in this case; B,  
22 helpful to clearly understand the witness' testimony or to  
23 determining a fact in issue, were they given information that  
24 they needed to make an informed investment decision; and C not  
25 based on scientific, technical, or other specialized knowledge

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1 within the scope of 702.

2 Here I know that you've made a point that the  
3 investors were quite sophisticated, they had previously  
4 invested in different investment vehicles including hedge  
5 funds and that they knew what some of these terms meant, they  
6 knew what the risks were, they were familiar with some of the  
7 language, but I do think that it's appropriate to probe the  
8 witnesses as to what was important to them when they made  
9 their decision.

10 *Cuti* also says when the issue for the fact finder's  
11 determination is reduced to impact, that is whether a witness  
12 would have acted differently if he had been aware of  
13 additional information, the witness so testifying is engaged  
14 in a process of reasoning familiar in every day life, so it is  
15 not -- and they make the point that the testimony was not  
16 rooted exclusively in the witness' expertise and did not  
17 address the soundness of accounting rules. So there was an  
18 alternative holding in *Cuti* I think that's applicable here as  
19 lay testimony to the extent we've characterized them or we may  
20 wish to perceive them as sophisticated investors.

21 MR. AGNIFILO: One thing I just point out -- I'm not  
22 sure if Your Honor was done with the analysis.

23 THE COURT: No, I just was addressing *Cuti*, but go  
24 ahead.

25 MR. AGNIFILO: Looking at the *Cuti* decision on

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1 page 459 it says, *Cuti* was able to argue that the auditor  
2 could not have been deceived about the accounting for that  
3 transaction. And the reason the Court says that is because  
4 they're talking about a body of accounting rules.

5 The problem with what we have here, it's really just  
6 the subjective operation of the witness' mind in a  
7 hypothetical sense. Had you known this or however they  
8 phrased it, you know, would you have invested, no. It's just  
9 not -- it's just not really a probative answer. I mean, it's  
10 a witness answering a hypothetical question, speculating about  
11 facts that in fact have not occurred, which is the whole  
12 reason they asked the question and then looking back three  
13 years and giving a dispositive answer about what seems to be  
14 an ultimate issue in the case.

15 So I don't think it's anything -- most respectfully,  
16 I don't think it's anything like the decision in *Cuti*.  
17 Because what I think the Second Circuit focused on in *Cuti* is  
18 that these witnesses were cross-examinable and they're  
19 cross-examinable because there is a body of accounting  
20 information that the questioner could use to cross-examine  
21 them.

22 Here, these answers are virtually bulletproof. If  
23 someone like, you know, Kocher says, yeah, had I known there  
24 was no liquidity, I wouldn't have invested, we're stuck with  
25 that answer. There is no way of cross-examining Mr. Kocher

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1 about what was in his mind, which is really in the nature of a  
2 pure opinion, so I think it's distinct.

3 Your Honor's insights, yeah, I agree that is  
4 certainly part of what the Second Circuit held, but I think  
5 the issues are fundamentally distinct. I think the subject  
6 matter of the testimony is fundamentally distinct, and I think  
7 the hypothetical questions are, most respectfully,  
8 inadmissible.

9 MR. SRINIVASAN: Your Honor, I think the Court has  
10 the issues clear in mind. The only thing I would add, Your  
11 Honor, is the defense has every ability to cross-examine the  
12 witnesses about what's going on in their minds and their  
13 reactions to this information, the decision to keep investing  
14 or not investing, redeeming, I think they've been fully able  
15 to do that.

16 When Mr. Agnifilo talks about *Cuti*, in that case the  
17 importance of the accounting rules was about the foundation  
18 for the auditors' ability to testify. So they were able to,  
19 you know, cross-examine them on the foundation, they were able  
20 to compare the rules versus what actually happened, for  
21 example.

22 Here we have the investors' actions, they're  
23 testifying, they're able to cross-examine them. I don't want  
24 to belabor the point, if the Court has any questions about  
25 *Cuti* or *Hatfield* I'm happy to answer them.

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1 THE COURT: Would you be able to try to craft your  
2 questions, as Mr. Agnifilo suggested, that is, would it have  
3 been important to you to fully be apprised of the fund  
4 manager's background? Would the statement that he was  
5 successful with other funds, was that an important factor, why  
6 was it important? I'm just wondering, the way Mr. Agnifilo is  
7 proposing that I guess you want to preclude the government  
8 from asking whether if they were aware of other aspects of  
9 Mr. Shkreli's background with regards to fund management  
10 whether their investment decisions would have been different?

11 MR. AGNIFILO: Yes, that's the heart of the  
12 objection.

13 MR. SRINIVASAN: Your Honor I think -- I'm sorry if  
14 the Court's not finished.

15 THE COURT: No, go ahead.

16 THE WITNESS: I think two points, Your Honor. We  
17 have to prove omissions and we have to prove the materiality  
18 of those omissions. So if you look at *Basic* or *Matrix* it's  
19 not simply something is important or a witness subjectively  
20 something is important to me, we have to establish that it  
21 affects the total mix of information that goes in the  
22 investing decision.

23 So you could have a situation where a defendant lies  
24 about the weather to a witness and the witness comes in and  
25 says that was important to me. You can make an argument that

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1 that had nothing to do with the investing decision. I think  
2 we have to tie those things all together to meet the  
3 materiality element in the securities laws. So that's why in  
4 *Cuti*, for example, there are a number of cases cited from the  
5 First, Sixth, the Ninth, a number of circuits, *Cuti* itself,  
6 *Hatfield*, it allows us to tie that materiality element all  
7 together to meet what we're supposed to do under the  
8 securities laws. Because otherwise we just have potentially  
9 innocuous misstatements or witnesses making clearly subjective  
10 statements about what is important to them and then arguably  
11 we might have a problem as far as what a reasonable investor  
12 would have considered important or would have affected the  
13 total mix.

14 So I think the hypothetical questions are the  
15 appropriate way to get to the omissions especially.

16 THE COURT: In the *Basic* case the Supreme Court  
17 discussed its decision in *TSE Industries*, which rose in the  
18 context of disclosure statements in a proxy solicitation. And  
19 in *Basic* they noted that in the *TSE* case the Court had  
20 explained that to fulfill the materiality requirement, there  
21 must be substantial likelihood that the disclosure of the  
22 omitted fact would have been viewed by the reasonable investor  
23 as having significantly altered the total mix of the  
24 information available. We expressly adopt the *TSE Industries*  
25 standard of materiality in the 10B and 10B5 context. It seems



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1 to me that what the court is doing is saying that, look, that  
2 materiality standard that was previously established in *TSE*  
3 with regard to disclosure or omissions in proxies now applies  
4 in this Rule 10B and 10B5 context.

5           Materiality depends on the significance that the  
6 reasonable investor would place on the withheld or  
7 misrepresented information. The fact specific inquiry we  
8 endorse is consistent with the approach a number of courts  
9 have taken in assessing the materiality of merger  
10 negotiations.

11           Again, the facts matter, the witness' statements are  
12 directly relevant to the government's burden of proving the  
13 materiality of statements or misstatements or omissions.

14           MR. AGNIFILO: I don't quarrel with any of that. I  
15 think the government can absolutely bring out that someone  
16 cared about liquidity, that someone cared about an auditor and  
17 we didn't object to any of those questions. We only objected  
18 to the hypothetical question. That's it. I mean, I agree  
19 completely that they have to show the overall mix of  
20 information and how it affected the investor, I agree with it  
21 completely. I think the hypothetical question is a question  
22 of a different nature, which is why we only objected to that.  
23 We didn't object to the whole line of questioning, we didn't  
24 object to the establishment of materiality with direct  
25 questions of what they cared about, we only objected to the

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1 hypothetical question. And I --

2 THE COURT: Would it make a difference if there was  
3 evidence in the record that supported the question and made it  
4 not hypothetical, i.e. the Elea Capital problem.

5 MR. AGNIFILO: *Cuti* says it would make a difference.  
6 The Second Circuit in *Cuti* says it would make a difference,  
7 correct. But *Cuti* also doesn't say that one factor is  
8 dispositive. I mean, the way I read the holding in *Cuti* that  
9 it was one of three central things that the Court focused on,  
10 the other two were the nature of the witnesses which was --  
11 and, yes, the investors here are sophisticated, but of a  
12 different nature.

13 THE COURT: They have a specific alternate holding  
14 that these were also lay witnesses and they explain why this  
15 line of questioning was appropriate. Whether or not you call  
16 them experts or lay witnesses, that wasn't a second holding  
17 that they made in assessing that testimony.

18 MR. AGNIFILO: They essentially said it was  
19 admissible lay opinion. But I think it's admissible lay  
20 opinion with the context being accountants and accounting  
21 rules.

22 My concern with the hypothetical question that we  
23 have here is there's no context for the question, you're just  
24 stuck with the answer. Had you known this, would you have  
25 invested? No. There's nothing we can do with that. I mean,

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1 we can say he's lying, we can say he's misremembering kind of  
2 what his decision was at the time, but it's void of factual  
3 content in a sense, which I think the Court in *Cuti* really  
4 focused on by saying you can cross examine these accountants  
5 because they're talking about accounting rules, and they're  
6 talking about how accounting is done.

7           When one of these witnesses says, had this been  
8 different, I wouldn't have invested you're just stuck with the  
9 answer. There is no way of cross-examining because it's the  
10 subjective, somewhat hypothetical subjective operation of the  
11 person's mind, but it also is sort of dressed up as I think a  
12 dispositive issue in the case and that's made us uneasy about  
13 it, that's why we think it's inadmissible.

14           I think the government gets everywhere -- and I'm  
15 not here to help them, I think they get everywhere they need  
16 to be by asking the witnesses what's important to them. I  
17 think they can do that and without the hypothetical question.  
18 I don't know really why they need it except that it's sort of  
19 like an added little zinger but I think it's an inappropriate  
20 zinger.

21           MR. SRINIVASAN: Your Honor, I think our questions  
22 have been crafted not to ask the witness to assume a fact as  
23 true. We've expressly avoided that. We're not going to get  
24 every single fact in the case through one witness.

25           To give you a concrete example, Lindsay Rosenwald,

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1 in the September of 2009 VPM for MSMB Capital, asked is there  
2 a representation in there that says Fulvio & Associates are  
3 the auditors for MSMB Capital, and so we ask him, you know, is  
4 that important to you the presence of an auditor and would  
5 that have affected your decision. Then there is a  
6 stipulation, which the defense agreed to, that Fulvio &  
7 Associates were not the auditors, were never the auditors and  
8 so that ties those things together. And so we'll do that with  
9 stipulations or calling witnesses, but I think we're going to  
10 tie those things together and what we're establishing is  
11 materiality. Just getting importance to an investor is not  
12 enough. You have to give context for that. And we have to be  
13 able to lay a factual foundation.

14 I think Mr. Agnifilo talks a lot about the  
15 reasonable investor, the objective reasonable investor but we  
16 don't deal with hypothetical witnesses in the case, right? I  
17 mean, we have to give the jury a factual context and then  
18 they're free to argue that that's not reasonable for the  
19 investor to make that statement or to rely on the  
20 representation or however they want to argue it it but I don't  
21 think that precludes us from using these questions to  
22 establish the factual foundation. I think we made a good  
23 faith -- and I think we have a good faith basis to ask these  
24 questions that we've seen pretty much every one of these  
25 witnesses which will tell the jury and the Court, in

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1 cross-examination or in direct examination, was this thing  
2 important to them, was it not important to them, would it have  
3 an affect and what kind of affect it would have had on them.  
4 They can cross-examine them on every single one of those  
5 issues. So I think that the questions we've been asking are  
6 proper and they are the way we can tie out materiality.

7 THE COURT: Yes, look, I think that what the  
8 government is describing is consistent with what Mr. Agnifilo  
9 is proposing except to the extent if you have asked, assume a  
10 fact X, then would your decision have been different, that  
11 would not be appropriate. But as long as you stick to the  
12 formulation you just described I think we're all on the same  
13 page that that would be appropriate.

14 MR. SRINIVASAN: That's correct, Your Honor. Our  
15 formulation is to take auditors, for example, if MSMB Capital  
16 did not have an auditor, would that affected your investing  
17 decision? We have not said I'm asking you to assume MSMB  
18 Capital doesn't have an auditor or if you learned that MSMB  
19 Capital doesn't have auditor, that's for example the  
20 formulation that Judge Seybert denied in the *Hatfield* case, if  
21 you have that formulation. I think we tried very carefully to  
22 do what *Cuti* says, which is, you know, there's a fact that the  
23 witness believes to be true, pose sort of the contrary fact  
24 which will the government will then tie out with other  
25 evidence and what is the reaction to that. I think we

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1 followed exactly what *Cuti* says.

2 THE COURT: What if you asked it, why would the  
3 engagement of an auditor or lack of an auditor be important to  
4 you, so you're giving them to -- and they can describe, would  
5 that be acceptable for Mr. Agnifilo's concerns?

6 MR. SRINIVASAN: Your Honor, I think at least for  
7 the auditors, it's an affirmative misrepresentation which is a  
8 little bit different. But, secondly, I think the witnesses  
9 have gone on to explain that. So you have Schuyler Marshall,  
10 for example, the auditor from yesterday talks about having,  
11 you know, independent check on financial information was  
12 important to him and it's something if it didn't exist he  
13 wouldn't have invested. I think the witnesses are providing  
14 that foundation for why these various pieces of information  
15 would have affected their decision and how.

16 THE COURT: Shall we move forward and hope for the  
17 best? It seems to me that they are trying very consciously to  
18 not drive the witness to respond to questions that offend what  
19 you are trying to prevent. I think that the government does  
20 have to utilize these witnesses to establish what a reasonable  
21 investor would consider important to their investment decision  
22 and they're conscious of your concerns, and they will do their  
23 best to avoid any formulation that would draw concerns, but I  
24 think they do have to explore the witnesses whether or not  
25 certain facts that were represented were important to their

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1 investment decision --

2 MR. AGNIFILO: I understand.

3 THE COURT: -- and to solicit why or why not these  
4 facts would be important. So, for example, I'm trying to  
5 remember what drew your objection. The first one was the  
6 thing about the loans but that was discarded, but the second  
7 question might have gone to -- do you remember? Does anyone  
8 have a clear recollection? We can try to look up the  
9 transcript, but --

10 MR. AGNIFILO: I believe we objected during the  
11 Kocher --

12 THE COURT: Is it the Elea Capital question?

13 MR. AGNIFILO: I think we objected to that.

14 MR. SRINIVASAN: Yes.

15 MR. AGNIFILO: I think --

16 THE COURT: Would the fund manager's success or lack  
17 of success have been an important factor in your investment  
18 decision, yes or no. Why would the success be important, why  
19 would lack of success be important. That seems to me to be --

20 MR. SRINIVASAN: That's right.

21 THE COURT: -- appropriate so that they could get a  
22 sense of -- elicit from the witness why certain disclosures or  
23 omissions would have affected your investment decision.

24 MR. AGNIFILO: I don't want to belabor the point, I  
25 think what's different about omissions is omissions are only

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1 actionable in the absence of a duty to disclose. So they have  
2 not -- there is no duty in the record, that's the problem. So  
3 if we get back to the *Cuti* decision --

4 THE COURT: Well, there is a duty if there is an  
5 entry statement of fact, material fact, it becomes important  
6 to disclose.

7 MR. AGNIFILO: I agree.

8 THE COURT: If you have to make sure that the  
9 statement of fact is not misleading.

10 MR. AGNIFILO: But with the Elea Capital omission  
11 there was -- there's been proffered no partial statement that  
12 has to be corrected. It seems to me an omission is actionable  
13 criminally if there's a partial statement that is misleading,  
14 if there is a duty to disclose like a fiduciary duty or  
15 statutory duty to disclose. In the absence of the three, an  
16 omission isn't actionable. So it's not an appropriate  
17 question to ask subjectively, would you have liked to know  
18 this.

19 THE COURT: Well, in this case I think Mr. Marshall  
20 just volunteered that if the fund manager had a bad track  
21 record it would definitely affect his investment decision.

22 MR. AGNIFILO: I think that's appropriate. See,  
23 we've only objected when it gets more specific and somewhat  
24 hypothetical. I think a witness has an absolute right to say,  
25 this is important to me. I think they can absolutely say



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1 that. I think what the government can't do is they can't say  
2 specifically would that omission have influenced your  
3 investment decision in the absence of establishing a duty,  
4 because they are suggesting there is something wrong with it.  
5 The very question -- the reason they're asking the question is  
6 because it sounds like they did something wrong. That's why  
7 they're insisting on asking the question now. They want to  
8 establish through the question it sounds like you did  
9 something wrong, but the law says otherwise, so that's why we  
10 object to that line of questioning to actually that specific,  
11 the hypothetical question.

12 THE COURT: Well, in terms of omissions is your main  
13 focus on the Elea issue or are there other omissions that are  
14 troubling you?

15 MR. AGNIFILO: The Elea issue is one, I think the  
16 Orex trade, you know, would you have liked to have known about  
17 the Orex trade, I just don't think it's an appropriate  
18 question. I don't think there is -- there is no duty in the  
19 record that a hedge fund manager has an obligation to disclose  
20 losses or disclose all the trades.

21 THE COURT: I think what we have, though, in  
22 addition to the lack of disclosure is a performance report  
23 saying you're doing great and look at all this money, this  
24 entire fund is up above the Standard & Poors 500. That's --

25 MR. SRINIVASAN: Exactly, Your Honor.

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1 THE COURT: -- that's the misstatement. So I mean  
2 whether that's an omission or whether that's a misstatement,  
3 it's an issue that they are entitled to present.

4 MR. AGNIFILO: Listen, what I'll do going forward, I  
5 appreciate the time that everyone has taken, if a hypothetical  
6 question is asked that I think is objectionable, I'll just  
7 object, we don't need to have a sidebar but the basis would be  
8 the substance of the discussion.

9 THE COURT: You can just say the one word  
10 "hypothetical" --

11 MR. AGNIFILO: Very good.

12 THE COURT: -- and Mr. Srinivasan or whoever else is  
13 questioning the witness for the government will know to  
14 reformulate the question or elicit the information in some  
15 other way that doesn't draw an objection.

16 MR. SRINIVASAN: Your Honor, I don't think it would  
17 necessarily necessitate us to reformulating the question,  
18 right? I mean the questions we've been asking I think are  
19 proper under *Cuti* and *Hatfield*. They've been limited to sort  
20 of specific issues that we're alleging misrepresentations and  
21 omission that are in the case and are part of the record.  
22 We're not sort of free form going into everything about the  
23 defendant, you know, if you'd known something about the  
24 defendant would have that affected your investing decision. I  
25 mean, issues like, you know, when he talked about his track

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1 record or listening that he I think he described his track  
2 record to investors, 12 years as a fund manager, good returns,  
3 good performance history, you know, if the defendant had run a  
4 prior hedge fund that performed poorly, would have that  
5 affected your investing decision. I think it's word for word  
6 the question we asked of Sarah Hassan and that we tried to use  
7 it with every single one, but Your Honor overruled the  
8 objection on that one.

9 So I don't think we should have to reformulate the  
10 question or hypothetical. I think the questions we've been  
11 asking are consistent with the everything the Court has been  
12 saying so far in materiality. If we go far afield and into  
13 the subjects that have nothing to do with the case, then I  
14 guess that's the relevance objection which is different than  
15 the objection Mr. Agnifilo is making now.

16 MR. AGNIFILO: To answer one of Your Honor's  
17 questions, Mr. Kocher was asked, if you had learned of any  
18 personal loans to the defendant what, if any, affect would  
19 that have --

20 MR. SRINIVASAN: Which was objected to.

21 THE COURT: And they withdrew it and circled back.

22 MR. AGNIFILO: Right, that's right.

23 THE COURT: So that's off the table.

24 MR. AGNIFILO: Right. Well, because it turns out  
25 they were trying to link it to something that the defendant

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1 might have said in one of his statements, but that ended up  
2 not being admissible. But my point is --

3 MR. SRINIVASAN: We pulled back on them, Judge, it's  
4 not in the case.

5 MR. AGNIFILO: I was going to say that. Yes, I know  
6 they withdrew it.

7 THE COURT: Give me something that we know is going  
8 to come up again that's going to cause you to jump up and  
9 object.

10 MR. AGNIFILO: They know what they're going to ask.

11 THE COURT: Well, no, but in terms of omissions it  
12 seems to be the Elea issue.

13 MR. AGNIFILO: It's Elea but they could  
14 theoretically -- I don't know what they're going to ask. The  
15 Elea --

16 THE COURT: And the other issue about the Orex trade  
17 wiping out the entire fund I think, yes, that's an omission  
18 but they also have alleged misstatements regarding performance  
19 of the fund and the health of the fund. So I think at the end  
20 of the day they don't need to even ask a hypothetical in that  
21 manner.

22 MR. AGNIFILO: I will object sparingly and briefly,  
23 I promise.

24 THE COURT: Okay, let's get the jury back.

25 MR. AGNIFILO: Your Honor, can I ask -- can we have